The plaintiffs-appellants further argue that as the damages depend upon the tin ore content and as the estimates of the experts were previously made upon boring only, better evidence is now available as tin ore has been removed and a certain area of the ground treated during such removal.

Mr. Hume who appeared with Mr. Lewis for the first defendants-respondents supported the refusal of the learned Judge to grant the order on three grounds. Firstly, that the Court has now no power to grant an order under section 497 of the Civil procedure Code as the land is no longer in the possession of the first defendants-respondents. If this were so, it would be a valid objection to the granting of an order, but on the 23rd of September, 1940, the plaintiffs-appellants obtained a conditional attachment of the sub-lease restraining the first defendants-respondents from transferring, leasing or charging the land. This order has never been cancelled nor was any certified copy of the title produced showing that the first defendants-respondents had in fact parted with possession. In the absence of any further evidence there is a presumption that the defendants-respondents are still in possession and whilst the order of 23rd September, 1940 remains in force they cannot be heard to say that they have parted with possession.

The other grounds put forward by the defendants-respondents in support of the refusal were that the plaintiffs-appellants had been guilty of unreasonable delay, that having had one order there must be some finality to the matter and further inspections by the plaintiffs-appellants would be very expensive and a waste of money.

It was not suggested that there has been any unreasonable delay since the re-occupation by the British forces, and in view of the conditions prevailing in Malaya from 1941 until the re-occupation I am not prepared to say that there has been unreasonable delay. It was also open to the defendants-respondents to expedite the hearing before the Registrar if they had so wished.

I am of the opinion that in view of the fact that more reliable evidence than the previous estimates which were based on boring only is available it is right in the interests of justice to allow such evidence to be produced to assist the Registrar in his task of deciding the amount of damages to be paid. It is to be noted also that the defendants-respondents will be able to produce their figures as to the actual amount of tin ore which has been extracted since the previous inspections by the experts. I would allow this appeal and grant the order asked for by the plaintiffs-appellants in the terms of their summons dated the 5th of March, 1948.

The second defendant-respondent did not appear on this appeal, he was stated to be dead. I think, therefore, that the first defendants-respondents should pay the costs of this appeal and of the application before the learned Judge in Chambers.

Appeal Allowed.

TAN SENG ANN v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J., Callow, J. and Russell, J.) August 5, 1948]

[Kuala Lumpur — Criminal Appeal No. 68 of 1948]

Emergency Regulations, 1948 Section 4 S. (1)(a) — Possession of firearm — Defence of duress — Penal Code S. 94.

In this case the appellant was convicted under Regulation 4 (1) (a) of Emergency Regulations 1948 for being in possession of a firearm, to wit, a revolver. In giving their opinions, the assessors added a rider that the appellant had acted under duress. The learned trial Judge subsequently directed the assessors on the law relating to duress. On appeal, it was contended that the learned trial Judge had erred in directing the assessors that only fear of immediate death would be a sufficient excuse.

Held, that the learned trial Judge was correct in his direction as duress to be pleaded successfully must be imminent, extreme and persistent.

Cases referred to :—

(1) *M'Growther's Case* 168 E.R. 8.

(2) *R. v. Stratton* 99 E.R. 156.

CRIMINAL APPEAL.

H. Y. Teh for the Appellant.

E. N. Griffith-Jones (Crown Counsel) for the Respondent.

The Judgment of the Court of Appeal was given by :—

Willan, C. J. : — In this case the appellant was convicted under Regulation 4(1) (a) of Emergency Regulations, 1948, for being in possession of a fire-arm, to wit a revolver, on the 18th July, 1948. Since the only punishment prescribed for such an offence is death, the appellant was sentenced to death.

The prosecution proved that the appellant and 4 other Chinese were stopped by the police on the night of 18th July, 1948, whilst travelling in a motor car. They were detained and searched. On the person of

the appellant a house-key was found. Three days later, that is on the 21st July 1948, the appellant took a police Inspector to his, the appellant's house, and after entry had been obtained by unlocking the house door with the key aforesaid, the appellant pointed out to the Police Inspector a revolver which was lying concealed in a cupboard.

Later, on the 21st July, 1948, the appellant made a statement to that Police Inspector, having been duly cautioned, and in that statement he gave two contradictory accounts of how he came to be in possession of the revolver. He first said that two Chinese had left the revolver with him for safe custody on the day he was arrested, but later in the same statement he said the revolver was his own property.

At his trial the appellant made a statement from the dock and therefore could not be subjected to cross-examination. Since the defence was that the appellant had voluntarily disclosed the whereabouts of the revolver to the police, that statement must be considered with care. That statement is as follows :—

> On night of 18th July, 1948, two men Wong Foo and Wong Kwai Hong came to my house and brought a small parcel. They said they wanted me to keep it in the house for a night only and that they would take it away in the morning. I asked them what the contents were. They said it was a revolver. I told them they could not leave it, it was very dangerous. They said it was only for a night and gave their word they would take it away in the morning. I said "If you don't take it away then there will be a lot of trouble". I was not co-operating with them, as they didn't trust me any more. They went away in the car with me. We were stopped at Selayang. On my arrest I was so frightened that I did not know what to do or what to say, until two days later, when I thought, if I did not disclose it, the two men might break into the house and get the revolver and do more harm with it. This was the first time I had ever seen a revolver. I never saw one in my life before. That is all.

Ignoring the admission made by the appellant to the police that the revolver belonged to him, and giving the statement he made in Court a construction most favourable to the appellant, it is clear that his intention was to keep the revolver for the two men over-night and hand it back to them next morning. It was not his intention to hand it over to the police at that time, nor did he disclose any such intention until three days later when he pointed out the whereabouts of the revolver to the police. Hence there can be no doubt that the appellant was in possession of that revolver with the intention of handing it back to the two men who left it with him and with whom, on his own statement, he had previously been co-operating, but had since stopped such co-operation because they did not trust him any more.

The trial was complicated at the end by the Assessors adding a rider to their opinions that the appellant had acted under duress. This they did when in fact no express defence of duress had been submitted. The learned trial Judge could have quite properly rejected this rider of duress, because we cannot find any evidence to support it. But in spite of that, the learned trial Judge *ex abundanti cautela* directed the Assessors on the law relating to duress which is contained in section 94 of the Penal Code (Cap. 45) which is as follows :—

> Except murder and offences included in Chapter VI punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequence: Provided that the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such constraint.

Counsel for the appellant attacked that part of the learned Judge's directions to the Assessors on the ground that he had directed them that only fear of immediate death would be a sufficient excuse.

We can find nothing wrong in these directions. It is clear from section 94 itself and from decided cases e.g. *M'Growther's Case*[1] and *R. v. Stratton*[2], that duress to be pleaded successfully must be imminent, extreme and persistent. There is nothing on the record in this case to suggest that duress was present or continued when the appellant went out in the car with the other Chinese on the 18th July, 1948.

In the result we find there are no merits in this appeal and it is accordingly dismissed.

Appeal Dismissed.

TARA SINGH AND OTHERS v. PUBLIC PROSECUTOR

[App. Crim. Juris. (Willan, C.J., Spenser-Wilkinson, J. and Russell, J.) August 10, 1948]

[Kuala Lumpur — Criminal Appeal No. 60 of 1948]

Evidence — Demeanour of witnesses — Impression as to demeanour must be based on whole of evidence of witness.

In this case the three appellants were convicted of participating in a gang robbery. At the trial it appeared that the whole case against the appellants rested upon the uncorroborated evidence of the complainant. The learned judge, in his grounds of judgment, stated that after careful consideration of the way in which the complainant gave his evidence and of his demeanour in the witness box he was satisfied that he was telling the truth. The appellants appealed against their conviction.